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No. 88-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMAN,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF AMICUS CURIAE, TENNESSEE PRESS ASSOCIATION

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BRIEF OF AMICUS CURIAE

INTERESTS OF THE TENNESSEE PRESS ASSOCIATION

The Tennessee Press Association, Inc. (hereinafter TPA), is a corporation existing pursuant to the laws of the State of Tennessee. It has its origin in an association of newspapers founded in 1869. This association of newspapers continued until its corporate existence was created and chartered in 1941.

The TPA represents substantially all of the daily or weekly paid subscription newspapers in the State of Tennessee. It has 139 member newspapers.

The TPA, through its Board of Directors, is vitally interested in the First Amendment and the preservation of rights and privileges accorded thereunder.

It has initiated litigation and become an intervenor in other litigation, both within the State of Tennessee and before the Sixth Circuit United States Court of Appeals, in situations where the facts and circumstances indicated a substantial First Amendment issue existed.

In this Cause, with approval of the parties, TPA offers its support for the Petitioner, John Zimmerman, in his request for a writ of certiorari, believing that the issues raised in the Tennessee tribunals have a direct, imminent and serious impact upon First Amendment rights and privileges enjoyed by the media within Tennessee.

The TPA, therefore, has a vital interest in seeking the review of the decision of the Tennessee Supreme Court which, if left undisturbed, would continue a pattern of constitutionally impermissible suppression of expression protected by the First Amendment and have a chilling effect upon members of the Bar, thus suppressing protected as well as unprotected speech and expression.

ARGUMENT: REASONS FOR GRANTING PETITION

THE PRESS HAS A VIABLE AND VALUABLE ROLE WITHIN THE CONSTITUTIONAL SYSTEM OF THE UNITED STATES WHICH IS FRUSTRATED BY THE DECISION BELOW.

Implicit in the constitutional history of the United States and more recently in decisional law is the proposition that a free society remains that way because of the confidence of its citizens in the government. This confidence and trust in government is enhanced and furthered by a dissemination under free and fair

circumstances of the widest possible array of information to the citizens.

The United States Supreme Court, writing against the backdrop of a particularly egregious set of facts constituting what was determined to be a blatant denial of due process, nonetheless recognized:

> . . . Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347, 90 L.Ed. 1295, 1303, 66 S.Ct. 1029 (1946); *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

The same philosophy was recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980), as follows:

> . . . Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. 1 J. Bentham, Rationale of Judicial Evidence 524 (1927). *Richmond Newspapers*, 448 U.S. 555, 569, 65 L.Ed.2d 973, 984-985.

It is enticing to assume that the First Amendment addresses only the right of speech. Were that true, the full freedom of expression recognized in this coun-

try would have long since been denied. As important as the right to speak freely may be, other rights involving the exchange of information occupy equally important positions within the protection of the First Amendment.

> . . . [T]he First Amendment goes beyond the protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 783, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978). Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' *Kleindienst v. Mandel*, 408 U.S. 753, 762, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972) . . . For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. *Bridges v. California*, 314 U.S. 252, 263, 86 L.Ed. 192, 62 S.Ct. 190, 159 ALR 1346 (1941). . . .
>
> It is not crucial whether we describe this right to attend criminal trials to hear, see and communicate observations concerning them as a 'right of access,' . . . (citations omitted) or a 'right to gather information,' for we have recognized that without some protection for seeking out the news, freedom of the press would be eviscerated . . . (cita-

tions omitted). *Richmond Newspapers*, supra, 448 U.S. 555, 575-576.

As we have repeatedly demonstrated in the United States and as recognized by the United States Supreme Court in *Richmond Newspapers, supra,* people in an open society are not demanding of infallibility from their government or its institutions. They have a hard time, however, accepting what they cannot observe. *Id.* 448 U.S. 555, 572.

Directly relevant to the above recognized constitutional guarantees is the potential impact of the Tennessee Supreme Court's interpretation of Disciplinary Rule 107 (hereinafter DR 7-107). Recognizing the legitimate right of the Tennessee Supreme Court to regulate the practice of law and the legitimate concern it has to safeguard the rights of the criminal accused and the integrity of our judicial system and the adversary process which we enjoy, there are still permissible statements as well as other forms of expression which may legitimately be utilized by attorneys in providing necessary information to the public through the media concerning the judicial process, the administration of justice and the function of the officers and officials concerned therewith. To the extent that any prohibition against speech is overreaching or overbroad, it stifles and restricts permitted expression and, by painting with a broad brush, deprives the citizens of information to which they are otherwise entitled.

THE DECISION BELOW IS OVERLY RESTRICTIVE GIVEN THE JUDICIAL RECOGNITION THAT PUBLICITY AND THE DISSEMINATION OF INFORMATION TO PROSPECTIVE JURORS IS NOT PRIMA FACIE IMPROPER

In *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961), the United States Supreme Court reversed the conviction of "mad dog Irvin" because of overwhelming juror prejudice created in part by massive prejudicial pre-trial publicity. In determining that there was clear and convincing evidence of prejudice, the Supreme Court nonetheless noted:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interests of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of the prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in the court. *Spies v. Illinois*, 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.Ed. 1021,

31 S.Ct. 2, 20 Ann Cas 1138; *Reynolds v. United States* (US), supra.

Subsequently, in 1963, Mr. Justice Clark observed in his dissenting opinion in *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963):

> The right to a trial before a fair and impartial tribunal "is a basic requirement of due process," *Re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S.Ct. 623 (1955), and must be safeguarded with vigilance. As we recognized in Irvin, however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors . . .

Thus, not every expression of fact or opinion as to guilt or innocence reaching the prospective jurors or other information which causes a potential predisposition in their mind is constitutionally repugnant. In order to be constitutionally impermissible, the information disseminated or the form of its dissemination must be such as to create an opinion that cannot be set aside. To simply assume that this has occurred based upon publicity or the *potential for publicity* is error.

> We have noted earlier that pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases 'cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively

> deprives the defendant of due process.' *Murphy v. Florida*, 421 U.S. 799, 44 L.Ed.2d 589, 95 S.Ct. at 2031; *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 565, 49 L.Ed.2d 683, 701, 96 S.Ct. 2791 (1976).

THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT BECAUSE IT PERMITS THE IMPOSITION OF RESTRICTIONS ON SPEECH UNDER LESS STRICT STANDARDS THAN CONSTITUTIONALLY RECOGNIZED.

A. Standards in Press Access Cases

It is an accepted constitutional principle that prior restraints are not favored under the First Amendment. This is such a fundamental principle in our law that it should be accepted without the necessity of citation. These prior restraints may take the form of express legislative prohibitions, implied restrictions brought about through fear of sanction or reprisal or judicial order.

> Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc. v. Virginia*, supra, at 581, n 18, 65 L.Ed.2d 973, 100 S.Ct. 2814 (plurality opinion); *Nebraska Press Assn. v. Stuart*, 427 U.S. at 570, 49 L.Ed.2d 683, 96 S.Ct. 2791. But the circumstances under which the press and public can be barred from a criminal trial are limited. That state's justification in denying access must be a weighty one. Where, as in the present case, the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, *it must be shown that the denial is necessitated by a compelling gov-*

> *ernmental interest, and is narrowly tailored to serve that interest. . . .* (citations omitted) (emphasis added) *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 73 L.Ed.2d 248, 257, 102 S.Ct. 2613 (1982).

Prior to the decision in *Globe Newspaper Co.*, supra, it had been previously observed in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558, 559, 49 L.Ed.2d 683, 697, 96 S.Ct. 2791 (1976):

> . . . Any prior restraint on expression comes to this Court with a heavy 'presumption' against its constitutional validity.
>
> * * *
>
> The thread running through all of these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

Restrictive orders are not the only vehicle by which free speech can be limited. The chilling effect on free speech brought about by the threat of sanction was recognized in *Nebraska Press Assn.*, supra, in the following language:

> . . . If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.
>
> . . . The damage can be particularly great when prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protec-

> tion against subsequent punishment (citations omitted) . . . Id., 427 U.S. 539, 559.

B. Contempt Cases

The United States Supreme Court has consistently used the "clear and present danger" standard to judge the constitutionality of contempt actions arising from out of court statements made during ongoing judicial proceedings. In a series of decisions beginning in the 1940's, This Court first addressed the indirect or constructive contempt issue based upon out of court statements as they related to pending litigation.

In *Bridges v. California*, 314 U.S. 252, 86 L.Ed. 192, 62 S.Ct. 190 (1941), Mr. Justice Black, writing for the majority of the Court, noted that the pending case rule regarding contempt judgments involving out of court statements and publications produced restrictive results at a time when public interest should be at its highest.

> It must be recognized that public interest is more likely to be kindled by a controversy over the event of the day than by a generalization, however penetrating, of a historian or scientist. Bridges, supra, 314 U.S. 252, 268, 86 L.Ed. 201, 206.

Thus to punish utterances during the pendency of litigation produces a ban on speech not only at a crucial time but on the most important topics of discussion. The right of free speech must be weighed against the interference with the administration of justice which the exercise of that right may produce.

> . . . the likelihood, however great, that a substantive evil will result cannot alone justify

> a restriction upon freedom of speech or the press. The evil itself must be "substantial." Brandeis, J. concurring in *Whitney v. California*, 274 U.S. 357, 376, 71 L.Ed 1095, 1105, 47 S.Ct. 21 (1887); it must be "serious", *id.* and even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Bridges v. California*, supra, 314 U.S. 262, 86 L.Ed 203.

In Bridges, Justice Black described the emergence from the clear and present danger cases of a workable principle providing that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

> . . . the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech or the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. *Bridges vs. California*, 314 U.S. 263, 86 L.Ed 203.

Five years later, in *Pennekamp v. Florida*, 328 U.S. 331, 90 L.Ed. 1295, 66 S.Ct. 1092 (1946), the United States Supreme Court observed:

> Without a free press, there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in

> that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. . . . A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; but are indispensible to a free society.

The vehemence of the language or the passion and fire which is kindled by that language is not the sole measure of the appropriateness of the use of contempt power to punish its utterance. As observed in *Craig v. Harney*, 331 U.S. 375-377, 91 L.Ed. 1550, 1552, 67 S.Ct. 1249 (1947):

> The danger must not be remote or even probable. It must immediately imperil.

It is respectfully submitted that the four step analysis found in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L.Ed.2d 1, 98 S.Ct. 1535 (1978), is the correct and appropriately applicable standard when judging whether sanctions or punishment are to be imposed as a result of extrajudicial statements or comment. This test requires a review of the interest of the government in the restriction, whether or not there is an imminent threat to the governmental interest to be protected, the likelihood of immediate harm and the restriction on the public's

comment necessary to secure that protection. No such standard or test was suggested by the Tennessee Supreme Court.

One of the best summaries of the appropriate standards to be applied when judging comment is found in *Landmark Communications, Inc. v. Virginia*, supra, 435 U.S. 829, 845, 56 L.Ed.2d 14, wherein Chief Justice Burger observed:

> In a series of cases raising the question of whether the contempt power could be used to punish out of court comments concerning pending cases or grand jury investigations, this court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. See *Bridges v. California*; *Pennekamp v. Florida*; *Craig v. Harney*; *Wood v. Georgia*. What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California* (cites omitted), and that a "solidity of evidence," *Pennekamp v. Florida* (cites omitted), is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney* (cites omitted).

THE DECISION BELOW ITSELF CONFLICTS IN ITS TERMS WITH THE FIRST AMENDMENT PRINCIPLES ABOVE RECITED.

The Petitioner, John Zimmerman, an Assistant District Attorney General for Davidson County, Tennes-

see, was charged by a Metropolitan Nashville Public Defender with the violation of DR 7-107 and various of its subparts. These allegations arose out of extra-judicial statements made by the Petitioner in two cases. One statement was made to a group of media representatives outside the courtroom following a preliminary hearing and the second was made following trial and adjudication of guilt but before a sentencing hearing for the convicted accused.

In neither case did the attorney for the Defendant apply to the Court for sanctions or apply to the Court for any form of remedy such as continuance, change of venue or restrictive order. About this there is no controversy.

In the course of the proceedings either before the Hearing Committee of the Disciplinary Board or in the Chancery Court for Davidson County to which the first appeal was taken, both trial judges offered testimony. Neither judge felt that there had been any negative effect upon the rights of the criminal accused as a result of the statements made by the Petitioner, Zimmerman.

In responding to the inquiry of the press in both instances, Mr. Zimmerman was simply following the policy of the District Attorney which was one of openness with the media.

The Tennessee Supreme Court observed:

> . . . The purpose of the sanctions under the Disciplinary Rules is to discipline, not to punish. *Zimmerman vs. Board of Professional Responsibility*, 764 S.W.2d 757, 761 (Tenn. 1989).

The threat of discipline (which may include loss of license) for exceeding the bounds of DR 7-107 is sufficient to establish a chilling effect upon speech and expression. The majority opinion observes:

> . . . We are of the opinion his comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his "open policy with the media" in relation to the nature of the comments his staff is encouraged to communicate. *Id.* 764 S.W.2d 757, 760-761.

The above language from the majority opinion illustrates succinctly and without need for elaboration the potential for the chilling effect so negative to the First Amendment. The Court did not observe that the comments constituted a "clear and present danger" or were an "imminent threat." It simply observed they were "not very well considered" and the Court indicated that they should be suppressed to avoid the "possibility" of violating an accused's constitutional rights. It is respectfully submitted that this falls far short of constitutional requirements.

The Tennessee Supreme Court adopted a "reasonable likelihood" standard. Such a standard is easy to adopt because it has a similarity to the "reasonable man" rule which permeates tort litigation. It falls readily to the judicial pen and may be readily understandable by the lower courts. However, such a standard, it is respectfully submitted, is constitutionally deficient because its application risks self censorship and the chilling effect on expression brought

about by the threat of discipline such as that suffered by Mr. Zimmerman. This constitutional deficiency is particularly visible when, as in this case, there is *absolutely no demonstration* of any negative consequences flowing from the utterances of Mr. Zimmerman as reported by the media.

It is respectfully submitted that Justice Drowota, in his dissent, properly enunciates the standards which should be applied to the interpretation of DR 7-107 in Tennessee.

> . . . There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmerman's statements should be reviewed by the test of 'whether his comments posed a clear and present danger to the fair trial of the defendant.' Under such a test, it is clear that Zimmerman's statements to the media did not pose a clear and present danger to the defendant's trial and he did not violate DR 7-107. *Zimmerman, supra,* 764 S.W.2d 757, 766.

CONCLUSION

The decision of the Tennessee Supreme Court below conflicts with applicable constitutional law and it is essential that this conflict be resolved promptly in order to avoid the potential for harm flowing to all parties which will result from this conflict.

Respectfully submitted.

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